

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 7, 2008

PHILLIP M. MULLINS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Putnam County
No. 99-0599 Leon C. Burns, Jr., Judge

No. M2008-00332-CCA-R3-PC - Filed December 19, 2008

The petitioner, Phillip M. Mullins, appeals from the denial of his 2004 petition for post-conviction relief, which challenged his 2001 convictions of felony murder, second degree murder, especially aggravated robbery, and especially aggravated burglary. He asserts (1) that he was denied the effective assistance of counsel at trial and on appeal; (2) that the State engaged in prosecutorial misconduct; (3) that the jury verdicts were inconsistent; (4) that the trial court abused its discretion by “adding a charge,” by admitting certain evidence, and by denying a defense motion to change venue; (5) that the jury pool was racially imbalanced; (6) that his “personal property was seized without a warrant”; (7) that the State was not required to prove every element beyond a reasonable doubt; and (8) that he was not provided “notice of a deal between the State and accomplice, Terry Dawson.” Finding that seven of the petitioner’s eight claims are waived and that he has failed to establish that his counsel was ineffective, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and CAMILLE R. McMULLEN, JJ., joined.

Harvey Douglas Thomas, Algood, Tennessee, for the appellant, Phillip M. Mullins.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; William E. Gibson, District Attorney General; and Beth Willis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 19, 2001, a Putnam County Criminal Court jury convicted the petitioner of felony murder, second degree murder, especially aggravated robbery, and especially aggravated burglary in relation to the August 17, 1999 death of the victim, 87-year-old Vernell Dixon. The jury imposed a sentence of life without the possibility of parole for the felony murder conviction. The trial court merged the conviction of second degree murder into the felony murder conviction and,

following a sentencing hearing, imposed sentences of 25 years for especially aggravated robbery and 12 years for especially aggravated burglary to be served concurrently to each other but consecutively to the sentence of life without parole. *See State v. Phillip M. Mullins*, No. M2002-02977-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Nashville, Dec. 29, 2003). The petitioner filed a timely appeal to this court, and we affirmed the convictions and sentences. *Id.* Following the denial of his application for permission to appeal to our supreme court on June 1, 2004, the petitioner filed a timely petition for post-conviction relief, mounting a six-issue challenge to his convictions. The petition was later amended to state additional claims.

The evidence, as summarized by this court on direct appeal, established that the victim's granddaughter-in-law, Beverly Dixon, was the last person to speak to the victim at around 7:00 p.m. on August 17, 1999. When Ms. Dixon "went by the victim's house at 6:20 a.m. on August 18, the victim did not answer" and Ms. Dixon "thought the victim was still asleep." *Id.*, slip op. at 5. Several hours later, the victim's son-in-law "went to fix something at the victim's house" and later telephoned his wife "to tell her to call 911 because he thought something was wrong with the victim." *Id.* Officers of the Cookeville Police Department discovered "the victim in the front bedroom of her house lying in bed motionless. Her clothes were pulled up, and there were abrasions on her face." *Id.* The victim's house "had been ransacked" and her jewelry and the money she kept in her wallet were missing. "[T]he screen to the victim's back door had been cut or torn out and the hook and eye closure had been ripped out [and] the back door had been forced open as if someone had used their shoulder to open the door." *Id.*, slip op. at 5-6.

Although he performed no autopsy, the Putnam County Medical Examiner determined that the "cause of death was suffocation" and that "the time of death was around 11:00 p.m. on August 17." *Id.*, slip op. at 6. Trace evidence testing and microanalysis matched shoe prints in the victim's yard and on her door to the defendant's shoes and matched fibers from the victim's orange shag carpet to orange fibers on the defendant's clothes. *Id.* "Two of the defendant's acquaintances, Heather Dutra and Chris Dawson" saw the defendant with a small amount of money and a ring matching the description of the victim's engagement ring in the early morning hours of August 18, 1999.

The petitioner filed a timely petition for post-conviction relief on September 3, 2004, alleging various forms of trial error and claiming that his trial counsel was ineffective. Appointed post-conviction counsel filed an amended petition for post-conviction relief on April 29, 2005, reiterating the petitioner's original claims and adding as an additional ground for relief that "the Judge violated [the petitioner's] Sixth Amendment right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence."

In the January 10, 2008 evidentiary hearing, the 47-year-old petitioner testified that counsel should have challenged on appeal the trial court's denial of his motion to suppress evidence derived from the illegal seizure of his shoes and clothing while he was incarcerated in the Putnam County jail and the trial court's denial of his motion for a change of venue. Regarding the seizure, the petitioner testified, "I don't think my attorney did enough to defend me, because . . . the shoes

. . . were illegally seized.” He claimed that “a veteran detective” “c[a]me over to the jail, had left the scene, c[a]me over from the scene to the jail, [and] remove[d] [the petitioner’s] shoes and clothes, without [the petitioner’s] knowledge.” The petitioner argued that the seizure was illegal because the items were taken before he was appointed counsel and without a warrant.

The petitioner also complained that his counsel was ineffective for failing to “present all forms of defenses available.” The petitioner explained that counsel failed to present evidence at trial that “[t]he blood that they found was not a comparison to [him]. . . [t]he pubic hair or head hair that was supposedly found, there was no link to [him].” The petitioner stated that he believed this evidence “would show [his] innocence to say, that if you found these samples of this blood, of this pubic hair, then did you have another suspect other than [the petitioner].” In a similar vein, the petitioner testified that counsel should have called as a witness Doctor Charles Harlan, who, he testified, performed an autopsy of the victim. The petitioner claimed that Doctor Harlan’s testimony would have conclusively established a time of death, which would have excluded the petitioner as a suspect.

The petitioner also took issue with counsel’s failure to object to the trial court’s charging the jury with second degree murder “after the first degree murder charge was dismissed” upon the defense motion for a judgment of acquittal at the conclusion of the State’s proof. In addition, he complained that counsel should have challenged the composition of the jury pool based upon the under-representation of African Americans. He also complained about the jurors selected, stating, “All the jurors, to my recollection . . . the prosecutor at that time, knew these jurors, it seemed to me that they were hand picked. . . . To say a jury of my peers, no, they [were not] a jury of my peers. There w[ere] no Afro-Americans sitting on the jury.” The petitioner conceded that his counsel challenged the composition of the jury pool but stated that he “felt that that issue should have been raised a little bit more thoroughly pertaining to the change of venue.”

The petitioner also complained that “the issue pertaining to Terri Dawson” “needed to be brought up.” He elaborated, “[T]he reason I felt that these issues needed to be brought up, because I was charged with aggravated burglary, Ms. Dawson, she was charged with aggravated burglary . . . but the courts came back and found that she had broken into a noninhabited building on the same night that I was charged with the same burglary.” He explained, “Ms. Dawson was . . . taken in front of another judge without the consent, where I had asked my lawyer that I want that person to be cross-examined, because I felt that if the [S]tate had evidence, I would like to know what that evidence was.” The petitioner stated that counsel should have called Ms. Dawson as a witness.

The petitioner testified that the State engaged in prosecutorial misconduct by failing “to present all favorable evidence to the defense.” He did not allege that the State withheld exculpatory evidence, only that “the prosecution should have . . . made it favorable to the jury to show that, if there was a [forensic] link.” He also complained that “the prosecutor . . . violated 404 and 404(b) of the rules of evidence” by eliciting testimony from Ms. Dutra that he was “buying and dealing in cocaine and using cocaine” and regarding “a ring that was supposed to have been taken

off of [the victim's] hand by [the petitioner] and sold for crack cocaine.” The petitioner also alleged prosecutorial misconduct in the jury selection, noting that the prosecutor knew some of the jurors personally, that some of the jurors “w[ere] kin to the city police department,” and that all of the jurors were white. Finally, the petitioner alleged that the State engaged in misconduct by failing to reveal its agreement with Ms. Dawson.

The petitioner complained that the verdicts rendered by the jury were inconsistent, claiming that dual convictions for second degree murder and felony murder violated principles of double jeopardy. He also alleged that convictions for second degree murder and felony murder “cannot co-exist because felony murder is essentially an unintentional act committed during the commission of an underlying offense. Second degree murder is the knowing killing of another.” When asked to elaborate, the petitioner stated, “I think that the inconsistent verdict rendered by the jury, what I had in the petition, speaks for itself.” In a similar vein, the petitioner claimed that the trial court erred by “adding” the charge of second degree murder after granting a judgment of acquittal on the charge of first degree premeditated murder.

The petitioner testified that the trial court abused its discretion by allowing the State to offer the testimony of Ms. Dutra and by denying the pretrial motion for a change of venue. The petitioner again contended that the sole purpose of Ms. Dutra’s testimony was to disparage his character. With regard to the change of venue motion, he testified that “[m]ost of the papers that are here in Cookeville” and various television stations covered his case prior to the trial and alleged that as a result of the coverage, “there wouldn’t be no fair trial.” The petitioner also testified that the trial court violated his Sixth Amendment rights by enhancing his sentences for especially aggravated robbery and especially aggravated burglary on the basis of the victim’s age and his prior convictions.

The petitioner also complained about the composition of the jury pool, noting that “two percent of the population of Putnam County” is black and that “[o]ut of that black community . . . [most] are [his] relatives.” He noted that the relatively low percentage of African Americans in Putnam County “was one reason [he] asked for a change of venue.”

During cross-examination, the petitioner conceded that counsel had asked for suppression of all evidence obtained as a result of the seizure of his clothing and shoes and had also requested a change of venue. The petitioner admitted that the trial court had decided each of these issues in favor of the State and further conceded that the trial court had specifically questioned each potential juror about exposure to pretrial publicity regarding his case. The petitioner testified that he did “not recall hearing” the victim’s time of death during the testimony of Putnam County Medical Examiner Sullivan Smith. The petitioner acknowledged that Ms. Dawson had given a statement to police implicating him in the crimes but nevertheless insisted that counsel was ineffective for failing to call Ms. Dawson as a witness.

Counsel, who had practiced law for more than forty years at the time of the petitioner’s trial, testified that he had represented “a number of criminal defendants, in capital murder cases,” and that he had “won some [he] shouldn’t have won, and . . . lost some that [he]

shouldn't have lost." Counsel stated that he was appointed to represent the petitioner after the public defender's office was removed. Counsel testified that he met with the petitioner "a great number" of times and that he met with the petitioner's family as well. He stated that he visited the crime scene as well as a bar nearby where the petitioner and Ms. Dawson spent time together. Counsel recalled that "[t]he real problem in the case was when it came time to get involved with Terri Dawson, . . . she had left and gone . . . somewhere with a man in the carnival." He noted that even after Ms. Dawson was returned to Cookeville, he did not have an opportunity to speak with her personally, although his investigator did.

Counsel stated that he did not specifically address the fact that blood found at the crime scene could not be linked to the petitioner because "that would be something that, if the jury was sitting and thinking, they would realize." He agreed that it "never occurred" to him to explain that point to the jury, stating that he did not want to emphasize minor details and chose, instead, to concentrate on the fact that "the only proof they had was the height of the shoulder print where one of the doors . . . was forced open, and the shoe prints."

Counsel testified that he did not object to the trial court's lowering the first degree premeditated murder charge to one of second degree murder because "[s]econd degree murder is usually a lesser included offense to first degree murder." Counsel stated that he interviewed Doctor Harlan prior to trial but determined that the time of death "appeared insignificant to the facts we had" because the petitioner asserted he had never been to the victim's house at all. Counsel took particular umbrage at the petitioner's suggestion that he should have prevented certain jurors from being seated because those jurors had relationships with the prosecution, stating, "Some relation to the prosecution is absolutely false. I have been a strong objector to [the district attorney general] and everything that he stood for, and every thing he's done" Although counsel could not recall with specificity the reasons he chose not to object to any particular juror, he agreed that none of the sitting jurors "had a strong enough relationship with . . . either the prosecutor or the officers" to necessitate a challenge for cause.

Counsel stated that he had "no recollection" of whether DNA evidence was taken from the petitioner but added that he would not have asked questions about DNA evidence unless it matched the petitioner, explaining, "[U]ntil the [S]tate has established [that the petitioner was] there, . . . it's their duty to show he was present[.] And I don't want to take the position with the jury that . . . there's some question about it by asking questions about DNA." Of this strategy, counsel stated, "If this was a mistake, I made it."

Counsel admitted that he did not investigate whether other people present at the crime scene wore shoes like those worn by the petitioner. He stated that, in his opinion, that "was not really an issue that would have put somebody else there." Counsel added, "The only question about [the chain of custody of the petitioner's clothes and shoes] would have been the shoes, which I probably, if I had known how the prosecutorial process was operated at the time, or what's transpired since then, I would have investigated it."

Counsel testified that he did not call Ms. Dawson as a witness because he was unable to interview her properly prior to trial due to restricted access to her and because he believed she had been bribed by the prosecution. He stated that he was never informed that the State had entered into a plea agreement with Ms. Dawson prior to trial. Counsel testified that he knew that Ms. Dawson would place the petitioner inside the victim's house on the night of the murder.

During cross-examination, counsel conceded that he did not challenge on appeal the trial court's denial of his motion to suppress evidence regarding the shoe prints, explaining, "I didn't feel it was important. . . . Usually you don't want to raise a lot of insignificant issues because, from my years of experience, that is really telling the Court that you don't have much of a case." Counsel testified that it was his belief that he had done "a fair job" of handling the forensic evidence.

At the conclusion of the evidentiary hearing, the post-conviction court denied relief, stating its findings of fact and conclusions of law on the record and ordering "that these findings should be part of the record" and incorporated into its written order denying relief. The court concluded that the petitioner had failed to establish by clear and convincing evidence that he was denied the effective assistance of counsel.

Addressing the petitioner's ineffective assistance claims individually, the post-conviction court found that counsel did not perform deficiently by failing to challenge on appeal the denial of the motion to suppress or request for change of venue. The court observed, "[N]othing in the proof here today, or nothing in the record . . . suggest[s] that case law would have been on the side of . . . the petitioner, and that the motion was improperly overruled. . . . [T]here's no proof to say that there was extreme publicity" The post-conviction court also accredited counsel's testimony that his failing to present any evidence regarding DNA testing was a tactical decision and determined that, in any event, the petitioner had failed to establish that there was testing that exonerated him. The post-conviction court ruled that the petitioner's allegation that trial counsel was ineffective for failing to object to the charge of second degree murder being submitted to the jury was "not supported by the facts nor the law." With regard to the petitioner's claim that trial counsel should have called Doctor Harlan as a witness, the post-conviction court accredited counsel's testimony that the victim's time of death was not relevant to the theory of defense. The post-conviction court also found that petitioner had failed to establish that counsel performed deficiently with regard to jury selection, noting that it had not "heard from any juror who would have [testified] that they had a relationship with the prosecution that would have tainted the case." Finally, the post-conviction court accredited counsel's testimony that presenting Ms. Dawson as a witness would not have been helpful for the defense.

The post-conviction court determined that the petitioner had failed to establish the remainder of his claims by clear and convincing evidence. The court noted that the petitioner had presented no proof that "there was favorable DNA evidence" or that "the jury was hand-picked by the prosecution." The court concluded that the petitioner's claims that the jury verdicts were inconsistent and that the trial court abused its discretion in allowing the testimony of Ms. Dutra should be denied as without merit. The post-conviction court determined that there was "no proof

to support” the petitioner’s allegations that venue should have been changed or that the jury pool did not represent a fair cross-section of the community. The court ruled that the petitioner’s claim regarding the seizure of his shoes had been previously determined. Finally, the post-conviction court ruled that the petitioner’s sentence was unaffected by the rulings in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and its progeny.

The petitioner filed a timely appeal to this court following the denial of relief. In this appeal, he reiterates each of the claims raised in his original and amended post-conviction petitions.

The post-conviction petitioner bears the burden of proving his or her allegations by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, the appellate court accords to the post-conviction court’s findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court’s conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

I. Ineffective Assistance of Counsel

The petitioner contends that his trial counsel was ineffective by failing “to present all issues on appeal,” by failing to “present all forms of defenses available,” by failing “to call all available witnesses,” by failing to present “the DNA evidence,” by allowing “the trial court to alter a charge,” and by allowing “the selection of jurors who were potentially biased against” him. The State asserts that the petitioner failed to establish by clear and convincing evidence that his counsel performed deficiently. We agree with the State.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given were below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies “actually had an adverse effect on the defense.” *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The error must be so serious as to render an unreliable result. *Id.* at 687. It is not necessary, however, that absent the deficiency, the trial would have resulted in an acquittal. *Id.* at 695. Should the petitioner fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

The petitioner first asserts that counsel should have challenged on appeal the trial court's denial of his motion to suppress evidence obtained as a result of the warrantless seizure of his shoes and clothing and the trial court's denial of his motion for a change of venue. He has failed to cite any authority for his assertion that the seizure of his shoes was illegal or that a change of venue was necessary. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). Moreover, the petitioner presented no proof at the evidentiary hearing, other than his own conclusory allegations, that the ruling of the trial court with respect to either motion was in error. Indeed, it is not entirely clear that the petitioner ever filed a motion to change venue. Counsel testified that he could not recall filing such a motion but acknowledged that one might have been filed before he was appointed to represent the petitioner. The petitioner failed to include in the appellate record the record of proceedings in the trial court, thereby depriving this court of the ability to review either motion on the merits. *See* Tenn. R. App. P. 24(b) (instructing that the appellant bears the burden of preparing an adequate record for appellate review).¹

Next, the petitioner argues that counsel performed deficiently by failing to present evidence at trial that established that there was no conclusive physical link between the petitioner and the crime scene. He asserts that trial counsel should have pointed out that neither the shoe print comparison nor the fiber analysis of material taken from his clothing decisively established that he was present inside the victim's home when she was murdered. Again, without the benefit of the trial record, it is impossible for this court to conduct an effective review of the merit of the petitioner's claim. Further, the post-conviction court accredited counsel's testimony that he was intentionally

¹Had the record of the post-conviction proceeding established that the post-conviction judge relied on a review of the trial transcript for its denial, we would comfortably take judicial notice of the transcript as a part of this court's record of the direct appeal. Moreover, if the record established that the post-conviction judge relied upon an independent recollection of the trial as a basis of denial, we would be confident in taking notice of the direct appeal record. Because the post-conviction record evidences no such reliance, however, taking judicial notice of our records would amount to looking outside the record considered by the post-conviction court, an action this court is unwilling to take.

circumspect in his treatment of the physical evidence purportedly linking the petitioner to the crime scene.

The petitioner also asserts that counsel was ineffective by failing to call Doctor Charles Harlan as a witness to establish the victim's time of death. The post-conviction court accredited counsel's testimony that the time of the victim's death was irrelevant to the petitioner's defense. He explained that the theory of defense was that the petitioner had never been to the victim's house and that it did not matter when the victim had died. More importantly, however, the opinion of this court on direct appeal establishes that Putnam County Medical Examiner Sullivan Smith testified at trial that the victim's time of death was "around 11:00 p.m."

In a similar vein, the petitioner contends that counsel should have called "all available witnesses" to establish his claims regarding the faulty chain of custody of his shoes and clothing and that the shoe print could have been contributed by law enforcement officers or emergency personnel. The petitioner failed to present at the evidentiary hearing any of the "available witnesses" he claims should have been called by trial counsel. "When a [post-conviction] petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). If he fails to do so, he generally fails to establish ineffective assistance of counsel. *Id.* The post-conviction court may not speculate "on the question of . . . what a witness's testimony might have been if introduced" at trial. *Id.*; see also *Wade v. State*, 914 S.W.2d 97, 102 (Tenn. Crim. App. 1995).

The petitioner also contends that counsel performed deficiently by allowing "the selection of jurors who were potentially biased against" him. His claim of bias, however, was not supported by any proof at the evidentiary hearing. As the post-conviction court observed, the petitioner failed to call "any juror who would have [said] that they had a relationship with the prosecution that would have tainted the case." Moreover, the petitioner failed to even allege that the jurors who sat on his trial were actually biased. See *State v. Taylor*, 669 S.W.2d 694, 700 (Tenn. Crim. App. 1983) (holding that the party alleging juror bias or partiality bears the burden of proof on the issue).

The petitioner next asserts that counsel performed deficiently by allowing the trial court to "alter" the first degree premeditated murder charge to one of second degree murder. As the post-conviction court observed, there is simply no basis in either law or fact for the petitioner's claim. Second degree murder is a lesser included offense of first degree murder. When the trial court granted a judgment of acquittal on the first degree premeditated murder charge, it was fully authorized to submit a second degree murder charge to the jury in its place.

Finally, the petitioner claims that counsel should have presented DNA evidence, which, he claims, would have established his innocence. Although the petitioner asserted at the evidentiary hearing that DNA evidence excluded him as the perpetrator, he failed to present any evidence to support his claim at the evidentiary hearing. Given the absence of the trial record and

the fact that DNA testing was not mentioned in the opinion of this court on direct appeal, it is not entirely clear that DNA testing was actually conducted in this case.

The petitioner has failed to establish that counsel performed deficiently in any respect.

II. Other Grounds for Relief

In addition to his claim that his counsel was ineffective, the petitioner contends that he is entitled to post-conviction relief because the prosecutor engaged in misconduct, because the jury verdicts were inconsistent, that the trial court abused its discretion in the admission of certain evidence and by submitting a second degree murder charge to the jury, that the jury pool did not represent a fair cross-section of Putnam County, that his shoes and clothing were seized illegally, that the jury “did not determine all legally essential facts beyond a reasonable doubt,” and that the State failed to disclose its “deal” with Ms. Dawson. The State contends that the petitioner waived each of these grounds by failing to present them on direct appeal. We agree.

Grounds for relief that have been waived or previously determined are not cognizable in a post-conviction proceeding. T.C.A. § 40-30-106(f) (2003). Section 40-30-106 defines “waived” as follows:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Id. § 40-30-106(g). Each of the grounds above could have been presented during the petitioner’s direct appeal but were not. Thus, they are waived for purposes of this post-conviction proceeding.

III. Conclusion

Because the petitioner has failed to establish by clear and convincing evidence that his counsel performed deficiently at trial or on appeal, he is not entitled to post-conviction relief on his claim of ineffective assistance of counsel. Because the remainder of his claims could have been presented on direct appeal but were not, these claims have been waived. Accordingly, the judgment of the post-conviction court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE